86-1593

No. A-550

Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1986

Shell Oil Company,
Appellant

vs.

Department of Revenue,
State of Florida,
Appellee

Appeal

from the Supreme Court of Florida

Jurisdictional Statement

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Question Presented

Is the State of Florida prohibited by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2) (1972), and Article VI, clause 2, the Supremacy Clause of the United States Constitution, from imposing a tax on the income earned by Shell from the production of oil and gas on the outer Continental Shelf, irrespective of whether that production income is derived from a sale of oil and gas to independent third parties on the Shelf itself or from a transfer on the Shelf into pipelines for transport and eventual sale within the United States.

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The real parties in interest of this case are Shell Oil Company and the State of Florida. Shell's parent corporation is SPNV Holdings, Inc., which, in turn, is owned by Shell Petroleum N.V. The latter's parents are Royal Dutch Petroleum Company (a Netherlands corporation) and The "Shell" Transport and Trading Company, p.l.c. (a United Kingdom corporation). Shell Oil Company

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itself owns directly or indirectly, both 100% and less than 100% stock interests in approximately one hundred and twenty (120) corporations that operate both in the United States and in foreign countries. All of the companies are often referred to collectively as the "Royal Dutch/ Shell Group of Companies." Counsel is advised that there are subsidiaries, not wholly owned, and affiliates throughout the world of this group which, in the aggregate, are so numerous that they could not be determined or identified for the Court within the time frame for filing this jurisdictional statement.

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Opinions Below

The decision of the Supreme Court of Florida being appealed is reflected in an opinion reported as Shell Oil Company v. Department of Revenue, 496 So.2d 789 (Fla. 1986). A copy of the opinion appears as Appendix 1. A decision of the First District Court of Appeal of Florida is reflected in an opinion reported as Shell Oil Company v. Department of Revenue, 461 So.2d 959 (Fla. 1st DCA 1984). A copy of the district court's decision appears as Appendix 2. An initial final summary judgment entered by the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon County, Florida, is unreported. A copy of this judgment appears as Appendix 3.

Jurisdiction

The appellate jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) (1985). The decision of the Florida Supreme Court upholds a construction of the state's corporate income tax code, Chapter 220, Florida Statutes, which is repugnant to the ban on state taxation contained in 43 U.S.C. § 1333(a)(2) (1972), the Outer Continental Shelf Lands Act. By rejecting the express prohibition in that federal statute, the decision below violates the Supremacy Clause in Article VI, clause 2 of the United States Constitution.

Alternately, Shell invokes the jurisdiction of the Court under 28 U.S.C. § 1257(3) (1985), on the dual grounds that Florida's income tax code is repugnant to federal law and that Shell's asserted rights are claimed under the Supremacy

Clause of the United States Constitution. Alternative treatment of the appeal as a petition for certiorari is authorized by 28 U.S.C. § 2103 (1985).

The decision of the Florida Supreme Court was entered on April 24, 1986, but did not become final until the denial of rehearing on November 24, 1986. (The order on rehearing appears as Appendix 4). A timely notice of appeal was filed in that court on January 28, 1987. (Appendix 5). On the same day, Shell requested an extension of time for docketing its jurisdictional statement. That request was granted by Justice Powell on January 30, extending the date of docketing to March 23, 1987.

Constitutional Provision and Statutes

This case involves the following provisions of law, each of which is reproduced verbatim in the appendix.

1. Article VI, clause 2 of the United States Constitution (Appendix 6);

2. 43 U.S.C. § 1331(a) (1972), a part of the Outer Continental Shelf Lands Act (Appendix 7);

3. 43 U.S.C. § 1301 (1972), a part of the Submerged Lands Act (Appendix 8);

4. 43 U.S.C. § 1333(a) (1972) (Appendix 9);

5. Section 220.02(4)(a), Florida Statutes (Supp. 1972) (Appendix 10);

6. Section 220.02(5), Florida Statutes (Supp. 1972) (Appendix 11);

7. Section 220.15, Florida Statutes (Supp. 1972) (Appendix 12);

8. Section 214.71, Florida Statutes (1971) (Appendix 13).

Statement of the Case

Shell is a multistate corporation whose business includes the extraction or production of oil and gas on the outer Continental Shelf of the United States. The Shelf is defined by federal law to be, essentially, the underwater lands more than three miles from the shore of any state of the United States. 43 U.S.C. §§ 1331(a) and 1301 (1972). (Appendices 7 and 8). No portion of the Shelf is located in the State of Florida or any other of the fifty states.

The federal government maintains exclusive ownership and control of Shelf lands. 43 U.S.C. § 1331(a) (1972). (Appendix 7). Shell's right to conduct exploration and production activities on the Shelf was acquired by lease from the United States government. For this privilege, Shell bid for the right of

exploration and production on the Shelf and pays the United States a lease bonus, a delay rental, and a royalty on its oil and gas production which results from these activities which is measured at the wellhead. By federal law, no taxes, fees or royalties of any kind are payable to any state on this production. Congress has said: "State taxation laws shall not apply to the outer Continental Shelf." 43 U.S.C. § 1333(a)(2) (1972). (Appendix 9).

In non-technical terms, outer Continental Shelf production activity involves platform drilling into lands below the oceans and seas more than three miles from the territorial limits of the state. The production process consists of the physical acts of erecting platforms, drilling into the seabed, extracting mineral products (oil and gas) from beneath the seabed, delivering

them up onto the drilling platform, and then causing their transfer into pipes or barges for delivery to landside receiving points in any one or more of the several states.

Net income in significant amounts was attributable to Shell's production of oil and gas on the Shelf in its fiscal years 1972-75. These amounts represented transfer prices for crude oil and natural gas delivered to pipelines at the producing platforms on the Shelf, less related costs and expenses. In the case of natural gas, all transfers were made by sale to non-affiliated, independent pipeline companies which rent space and take delivery of the gas on the platform. In the case of crude oil, some transfers were made by sale to independent third parties on the platform, but most were delivered to Shell's own pipeline for transport to shore.

Neither Shell nor any other petroleum company refines or otherwise changes the character of crude oil on Shelf platforms.

Sales of natural gas and crude oil to independent third parties are concluded transactions on the Shelf which constitute and have been treated by Shell as taxable events for federal income tax purposes. Based on the prohibition contained in federal law with respect to the outer Continental Shelf, as expressed in 43 U.S.C. § 1333(a)(2) (1972), Shell excluded its earnings from Shelf sales from its taxable income reportable for Florida income tax purposes. The Department of Revenue conceded to the Florida Supreme Court that actual sales consummated on Shelf platforms are beyond Florida's reach, by reason of section 1333(a)(2). Shell Oil Company v. Department of Revenue, 496

So.2d 789, 790 (Fla. 1986). (Appendix 1).

The transfer of crude oil into Shell's pipeline at the platform represents the final step of Shell's production activities on the Shelf. These activities generated earnings which Shell excluded from its income for Florida income tax purposes. These earnings were measured by reference to the fair market value of crude oil at the wellhead, the required method of determining a sales equivalent for computing royalties paid to the United States government for Shelf leases, for computing income from Shelf property under sections 613 and 613A of the Internal Revenue Code where there have been no sales to independent third parties, and for computing the federal windfall profit tax.

Florida's corporate income tax basically tracks federal taxable income, apportioned to the state on the basis of a three-factor formula using payroll, property and sales. §§ 220.02(4) and (5), 220.15, Fla. Stat. (Supp. 1972) and § 214.71, Fla. Stat. (1971) (Appendices 10, 11, 12, 13). For each of the years in controversy, Shell excluded from its adjusted federal income apportionable to Florida all Shelf oil and gas production revenue from sales and transfers on the Shelf, less costs and expenses related to that production income. For the tax years in question, Shell not only excluded from Florida reportable income all its Shelf production income, but for consistency it correspondingly excluded from the denominator of its Florida apportionment formula the real and tangible personal property located on the Shelf for those years, the payroll

attributable to production on the Shelf, and the sales on the Shelf as measured by sales or by wellhead transfer prices.

On audit, the Department of Revenue rejected Shell's exclusion of Shelf income and assessed additional corporate income tax by including all Shelf production earnings in apportioned taxable income. The Department asserted that this income, for Florida tax purposes, was generated by the realization of funds when Shell eventually sold the gas and oil (after refining) within the several states of the United States. (As indicated, the Department subsequently conceded Florida's legal inability to tax sales to independent third parties on the Shelf, thus excluding all sales of gas.)

For the purpose of computing the tax due, the Department went further and included Shelf-derived oil and gas sales

in the denominator of the apportionment formula. It refused to include in the denominator the payroll and property which Shell employed in extracting the oil and gas from beneath the sea, however, despite the fact that Shelf properties alone were valued up to two billion dollars for the tax years in question and represented up to 19% of Shell's United States properties in those years. The Department's basis for excluding Shelf payroll and property was its contention that these costs did not fit within the statutory definition of "everywhere" under the apportionment formula. See section 220.15(3), Florida Statutes (Supp. 1972). (Appendix 12). The effect of these adjustments was to tax Shell on all its Shelf production income, yet allow no correlative benefit in computing Florida's share for the payroll and property which generated that income.

Shell brought suit in Leon County Circuit Court, challenging the Department's assessment for the years in question. In order to crystallize the issue of total exclusion of Shelf production income by reason of the prohibition contained in the federal statute (as also required by Florida law itself, see Appendices 11 and 12), Shell withdrew its assertion that payroll and property should be included in the denominator of Florida's apportionment formula before the trial court entered final summary judgment.

The trial court held that federal law did not prevent the inclusion of Shelf production earnings in Florida's tax base, and it entered summary judgment against Shell with respect to the exclusion of Shelf production income. (Appendix 3). On appeal, the First District Court of Appeal affirmed the

trial court's inclusion of Shelf production income in Shell's apportioned taxable income for Florida income tax purposes. (Appendix 2). On further review in the Florida Supreme Court, the Department of Revenue conceded that income from the actual sale of oil and gas on platforms was not taxable. Shell Oil Company v. Department of Revenue, 496 So.2d 789, 790 (Fla. 1986). (Appendix 1). The Court, however, affirmed the inclusion of earnings from other transfers on the Shelf in Shell's Florida taxable income.

Reasons for Plenary Consideration

Congress debated long and hard over a twenty-six year period, from 1937 through 1953, to resolve the clash between state and federal interests about the mineral products derived from the outer Continental Shelf. Congressional resolution came in the form of the Outer

Continental Shelf Lands Act and the Submerged Lands Act, both of which declared federal sovereignty over the Shelf, established exclusive federal rights to Shelf interests, and expressly barred state intrusion on those rights. In the Outer Continental Shelf Lands Act, Congress expressly banned state taxation of revenues from Shelf activity and products.

The statute manifested a policy decision by Congress that any form of state levy, direct or indirect, would adversely affect the amounts of revenue available to the federal government from the sale of leases for exploration and production on Shelf lands.

> It is the Committee's collective judgment that under the terms of S. 1901 as reported, State taxation laws necessarily are excluded from applicability in this area of exclusive Federal jurisdiction not inside the boundaries of any state. Paragraph (3) of Section 4(a) specifically commands that --

> The provisions of this section for adoption of the State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any state for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (emphasis added).

S. Rep. No. 411, 83rd Cong., 1st Sess. (1953).

When representatives of the State of Louisiana urged an amendment allowing the extension of state boundaries onto the outer Continental Shelf, in order to authorize the power to impose state taxes, Senator Cordon argued against the amendment stating: "Either the Outer Continental Shelf is territory where the sole jurisdiction, control, and right to tax in any form is in the United States, or it is not." 99 Cong. Rec. 7234 (1953). The Louisiana amendment was rejected, as was a last ditch argument

by Senator Long of Louisiana that services for Shelf workers would have to be paid for by increased state taxes "if the employers of these workers are subject neither to the State's severance tax, property tax, nor the tax on corporate profits." 99 Cong. Rec. 7261 (1953) (emphasis added).

From time to time, this Court has been called upon to settle disputes between the states and the federal government regarding Shelf properties or interests. On each occasion, the Court has held that Congress intended that the property and natural resources of the Shelf be considered a national, rather than a local resource.

In a trilogy of cases, the Court held that the federal government had paramount right to submerged lands even within the historic boundaries of California, Texas and Louisiana. United

States v. California, 332 U.S. 19 (1947); United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950).

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there.

United States v. Louisiana, 339 U.S. at 704. Congress' express prohibition against the application of state tax laws to the Shelf was called into consideration in Maryland v. Louisiana, 451 U.S. 725 (1981). At issue was the constitutionality of Louisiana's "first use" tax on natural gas brought into the state. Despite a declaration in the Louisiana statute that the tax was not imposed on the gas itself, and consequently was not a tax imposed by the state on Shelf production, the Court observed that the inevitable result of the state levy was

to tax Shelf production in contravention of the prohibition contained in 43 U.S.C. § 1333(a)(2) (1972).

> [A state] has no sovereign interest in being compensated for the severance of resources from federally owned OCS land.

Maryland v. Louisiana, 451 U.S. at 759. A focus of the Court's concern in analyzing the tax issue was the effect that Louisiana's tax would have on the prices bid for leases of Shelf exploration rights.

The several states are once again endeavoring to impose their taxes in ways designed to reap financial benefits from Shelf production revenues at the expense of the federal government. These efforts are centered on the use of state income tax laws to siphon off earnings from Shelf production income by attributing to the states a share of the Shelf income generated by multistate oil producing corporations. The mechanisms

for this approach are the apportionment provisions of state income tax statutes.

In concept, apportionment laws allow the assignment of net income to particular states by relating the in-state activities of corporate taxpayers to their nationwide activities. These statutes are being used to sweep into the state's revenue base the net income of oil production companies which is generated by Shelf production. Just as was the case with Louisiana's first use tax, however, these tax burdens on gas and oil producing companies must adversely affect the bid prices for Shelf lease rights which are payable to the federal government.

The use of state income tax statutes to garner revenues from Shelf production is just as devastating to future federal lease revenues as other forms of direct and indirect taxes. For one thing, the

effect is widespread because almost all states impose a corporate income tax and the oil and gas producing companies conduct business in virtually every state. For another, the threat to lease payments is exacerbated by the fact that there is no uniformity among the states in the factors or methodology of apportionment.

Florida's taxation of Shelf production revenues, as authorized by the Florida Supreme Court, is not unique in the country. Administrative agencies throughout the nation, as well as the courts in Florida, have given a free hand to their revenue personnel to tax Shelf production revenues through the manipulation of apportionment factors and formulae. These increased local tax burdens laid on the multistate oil producing corporations must inevitably lower revenues to the federal government

from leases for Shelf exploration and production -- precisely the result Congress attempted to forbid with its proscription that "state taxation shall not apply to the Shelf." The misuse of state apportionment formulae is presently being litigated in Alaska and Iowa, as well as in Florida. Amerada Hess Corp. v. Alaska, Department of Revenue, No. 3AN-84-05016 (Alaska 3d Cir. Super. Ct.); Shell Oil Company v. Iowa, Department of Revenue, No. 86-1565 (Iowa Supreme Court).

Florida's attempt to tax Shelf production income has a dual distinction. First, it is the most egregious distortion of an apportionment formula in the various state cases, by reason of the exclusion of payroll and property factors in the computation. Second, it is the first case squarely on this issue to reach this Court. As such, it presents

the Court with the unique opportunity to rescue national policy from a significant and widespread erosion of that policy in a single-issue adjudication. This case poses the issue of federal supremacy squarely. Shell raised the Outer Continental Shelf Lands Act as a bar to Florida's tax reach in filing its tax returns for 1972-75, and it has asserted the statute as a prohibition to the revenue department's proposed adjustments at each stage of this litigation.

Conclusion

Through its revenue department and its courts, the State of Florida has authorized a state income tax on net earnings from the production of oil and gas on the outer Continental Shelf. The revenues affected are not subject to state taxation, however. Congress and this Court have zealously protected the

federal government's lease revenues from Shelf properties. Florida's erosion of those revenues by the taxation of Shelf production income provides a clear and timely occasion for this Court to vindicate the express ban on such taxation in federal law.

The issue of federal supremacy has been squarely litigated and preserved. Either "state taxation laws shall not apply to the outer Continental Shelf," or they will be permitted to do so. Only this Court can decide.

Respectfully submitted,

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Appendix 1

SHELL OIL CO.

v.

DEPARTMENT OF REVENUE

Cite as 496 So.2d 789 (Fla. 1986)

SHELL OIL COMPANY,

Petitioner,

v.

DEPARTMENT OF REVENUE,

Respondent

Nos. 66240, 66154

SUPREME COURT OF FLORIDA

April 24, 1986.

Rehearing Denied November 24, 1986.

The Circuit Court, Leon County, Ben C. Willis, J., entered summary judgment subjecting income derived from sale of oil to corporate income tax, and oil company appealed and Department of

Revenue cross-appealed. The District Court of Appeal, Smith, J., 461 So.2d 959, affirmed and certified question. The Supreme Court, McDonald, J., held that: (1) state of Florida was not precluded by federal law from imposing tax upon income derived from sale in United States of oil extracted from Outer Continental Shelf, and (2) intangible drilling costs, expensed for federal income tax purposes, could not be added back into oil company's asset base when calculating property factor of apportionment formula for state income tax purposes.

Approved in part and quashed in part; certified question answered in the negative.

Boyd, C.J., dissented and filed opinion in which Shaw, J., concurred.

1. **Taxation 1002**

Oil company's realization of income on oil extracted from Outer Continental Shelf occurred at time of sale in United States, rather than at the wellhead, though oil company assigned wellhead price to oil, in that oil company did not derive any actual economic gain until time of sale. West's F.S.A. § 220.02(4)(a).

2. **Taxation 935**

State of Florida is not prohibited, by statute exempting Outer Continental Shelf from state taxation laws, from imposing Tax upon income derived from sale in the United States of oil extracted from Outer Continental shelf. Outer Continental Shelf Lands Act, § 4(a)(2), 43 U.S.C.A. § 1333(a)(2).

3. **Taxation 1005**

Intangible drilling costs which oil company elected to expense for federal income Tax purposes could not be added back into oil company's asset base when calculating property factor of apportionment formula for purposes of state taxation. West's F.S.A. §§ 214.70-214.73, 220.15(4), 220.42(1); 26 U.S.C.A. § 263(a,c).

Arthur J. England, Jr. and Sandra S. Barker of Fine Jacobson, Schwartz, Nash, Block and England, Miami, and William D. Peltz, Senior Tax Counsel and Elizabeth C. Burton, Tax Atty., Shell Oil Co., Houston, Tex., for petitioner.

Jim Smith, Atty. Gen., and Joseph C. Mellichamp, III, and Sharon A. Zahner, Asst. Attys. Gen., Tallahassee, for respondent.

McDONALD, Justice.

The First District Court of Appeal has certified the following question as one of great public importance:

> Whether the State of Florida is prohibited by U.S.C. § 1333(a)(2)(A) [sic] from imposing a tax upon income derived from the sale in the United States of oil extracted from the outer Continental Shelf?

Shell Oil Co. v. Department of Revenue, 461 So.2d 959, 963 (Fla. 1st DCA 1984).[1] This Court has jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution. We answer the certified question in the negative, approving in part and quashing in part the opinion of the district court.

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[1] In certifying the above question to this Court, the district court cited to the presently existing section 1333(a)(2)(A). For purposes of the instant case, we shall deal with this statute as it existed during the period relevant to our review, 43 U.S.C. § 1333(a)(2) (1970).

Shell Oil, a Delaware corporation, conducts business throughout the United States. Among its many activities, Shell operates a number of drilling platforms for the extraction of crude oil and natural gas from the outer continental shelf (OCS). Shell makes all transfers of OCS natural gas by sale to nonaffiliated independent pipeline companies that rent space on Shell's platforms. In the case of crude oil, Shell makes some transfers by sale to independent third parties, but Shell delivers most of the oil to its own pipeline for transport to shore. Shell treats all transfers, whether to third parties or to the pipeline, as taxable events for federal income tax purposes. Shell, however, excludes such earnings from its taxable income for Florida income tax purposes. The company determines the revenue which the transfers generate

based on the fair market value of crude oil at the wellhead less related expenses. Most of the oil extracted from the OCS wells is refined and sold in the United States.

The Florida Department of Revenue (DOR) disallowed Shell's exclusion of certain OCS production income from its Florida tax base for fiscal years 1972-75. The trial court agreed with DOR as to the exclusion. The court, however, ruled that Shell could include its intangible drilling costs (IDCs) in the property factor of Florida's tax apportionment formula. Both parties appealed, and the district court affirmed the trial court as to both issues. On rehearing, however, the district court certified the instant question to this Court. Following certification, both parties independently petitioned this Court for review. These

petitions have been consolidated for purposes of the case at bar.

Section 1333(a)(2) of the Outer Continental Shelf Lands Act states that state taxation laws shall not apply to the outer continental shelf. 43 U.S.C. § 1333(a)(2) (1970). Neither DOR nor Shell Oil disputes this, and both parties agree that the oil production in question is derived from the OCS. Further, DOR concedes that any revenues which Shell derives from actual sales consummated on the OCS oil platforms are beyond the reach of Florida's taxing power as limited by section 1333(a)(2). Accordingly, the dispute concerns only the income derived from sales of OCS oil actually made within the boundaries of the fifty states.

DOR contends that because Shell sold the oil within the boundaries of the fifty states, and not on the OCS,

the taxable event occurred within the reach of Florida's tax laws. On the other hand, Shell contends that the time and location of the actual sale are irrelevant because no sale of OCS production can ever be subject to state taxation. Shell claims that section 1333(a)(3) of the Outer Continental Shelf Lands Act supports this contention. Section 1333(a)(3) reads:

> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

We find that Shell's reliance on section 1333(a)(3) is misplaced. Although section 1333(a)(3) prevents states form claiming an interest in or jurisdiction over the revenues derived from OCS natural resources, the language of this

subsection when read in conjunction with the rest of section 1333(a) simply constitutes a limitation of state authority over the OCS area and does not seem intended to address income derived outside the OCS.[2]

[1] Income is normally taxed when realized. Helvering v. Horst, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75 (1940); § 220.02(4)(a), Fla.Stat. (Supp.1972). Realization occurs when a taxpayer receives actual economic gain from the disposition of property. Helvering, 311 U.S. at 115, 61 S.Ct. at 146; S.R.G. Corp. v. Department of Revenue, 365

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2 If this were not so, we would be at a loss to understand why the United States Supreme Court, in Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981), tested the validity of Louisiana's "first use" tax by examining its effect on interstate commerce rather than by scrutinizing the viability of taxing gas derived from the outer continental shelf.

So.2d 687 (Fla.1978); Heftler Construction Co. v. Florida Department of Revenue, 438 So.2d 139 (Fla. 3d DCA 1983), review denied, 449 So.2d 264 (Fla.1984). In the case at bar, this realization occurred at the time of sale. Clearly, no realization of income occurred at the wellhead, despite Shell's assignment of an artificial wellhead price to the oil, because Shell received no actual economic gain from any "sale, exchange, or other disposition of property" at that point. § 220.02(4)(a). Rather, realization occurred at the time Shell sold the oil in the States because only at that time did Shell derive any actual economic gain.

[2] Shell insists that all OCS production should be excepted from the general rule that the time of realization is the proper time for judging the

taxable nature of income. Yet the cases Shell cites for the proposition that the instant transactions lie beyond the taxable reach of DOR are distinguishable. In both Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982), and James v. Dravco Construction Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), the income was realized beyond the respective state's taxing jurisdiction. In the instant case Shell realized the income within the fifty states and both parties agree that Florida can generally levy an apportioned tax on income derived within any of the fifty states. Thus Shell has offered no relevant authority for its claim that OCS production sold in the states should be an exception to the norm. As the district court pointed out, taking Shell's argument to its

logical conclusion, no state could impose any kind of tax on any final product which eventually might be derived from OCS production. We join the district court in finding that Congress never intended such a sweeping result when it passed the Outer Continental Shelf Lands Act. Therefore, we approve the district court's opinion as it relates to the certified question, which we answer in the negative.

[3] We find, however, that the district court erred in ruling that expensed IDCs should be added back into Shell's asset base when calculating the property factor of the apportionment formula. IDCs are not inherently capital in nature. Under federal law, Shell had the option of either capitalizing or expensing its IDCs. IRC § 263(a) & (c) (1954); Treas.Reg. 1.612-4 (1965). Shell elected to expense them for

federal income tax purposes, thereby deducting the IDCs from its taxable income base. Section 220.42(1), Florida Statutes (Supp.1972), requires that a taxpayer's method of accounting for purposes of the Florida Income Tax Code be the same as the taxpayer's method of accounting used for federal income tax purposes. Accordingly, Shell expensed its IDCs on its Florida income tax return.

IDCs occupy a special tax category, offering an incentive to oil and gas exploration and production. Exxon Corp. v. United States, 37 A.F.T.R.2d (P-H) 76-730, 547 F.2d 548 (Ct.Cl.1976); Atlantic Richfield Co. v. Department of Revenue, 9 Or.T.R. 451 (1984). Care must be taken, however, not to extend the obvious benefits of this special treatment beyond its intended boundaries. Exxon Corp., 37 A.F.T.R.2d (P-H)

at 76-736, 547 F.2d 548; Atlantic Richfield Co., 9 Or.T.R. at 453-54.

Under the Uniform Division of Income for State Purposes Act (UDITPA), which Florida has adopted, a given state determines its apportioned share of a multistate corporation's taxable income on the basis of a three-factor formula composed of sales, payroll, and property. § 214.70-.73 & 220.15(4), Fla. Stat. (1973). Although Shell expensed its IDCs from its taxable income base, it added the IDCs back into its asset base for purposes of calculating the property factor. Federal tax regulations expressly provide, however, that, in the case of oil and gas wells, no adjustment to basis shall be made with respect to IDCs allowable as a deduction in computing net or taxable income. Tres. Reg. § 1.1016-2(a) (1957). Moreover, under Florida law, property is to

be valued at "original cost" for purposes of inclusion in the property factor of the apportionment formula. Fla. Admin.Code Rule 12C-1.15(4)(b)(5). Rule 12C-1.15(4)(b)(5) defines "original cost" as the basis of the property for federal income tax purposes at the time of acquisition plus any subsequent capital additions or improvements and less any partial dispositions by sale, exchange, or abandonment. Accordingly, because Shell elected to expense its IDCs and thereby voluntarily subjected itself to the restrictions of treasury regulation section 1.1016-2(a), the Florida Administrative Code bound Shell to the same election for Florida purposes. This ruling is consistent with the results reached by the vast majority of other states operating under the UDITPA. Atlantic Richfield Co., 9 Or.T.R. at 455; Appeal of Pauley

Petroleum, Inc., [1982] California Tax Reports (CCH) § 400-101. In addition to ignoring rule 12C-1.15(4)(b)(5), the district court erred in disregarding the clear mandate of section 220.42(1), Florida Statutes (Supp.1972), which requires a taxpayer's accounting method for Florida tax purposes be the same as the method used for federal income Tax purposes. Although DOR failed to bring this statute to the trial court's attention, a reviewing court must follow controlling statutes no matter what omissions may have occurred at trial. Bendenbaugh v. Adams, 88 So.2d 765 (Fla. 1956); City of Lakeland v. Select Tenures, Inc., 129 Fla. 338, 176 So. 274 (1937); Barnett Bank v. Jacksonville National Bank, 457 So.2d 535 (Fla. 1st DCA 1984); § 90.201, Fla.Stat. (1983).

Accordingly, we answer the certified question in the negative and

approve the opinion of the district court as it relates to the taxation of OCS production income realized within the fifty states. We quash, however, the opinion of the district court as it relates to the inclusion of IDCs in the property factor of Florida's tax apportionment formula and remand for proceedings consistant with this opinion.

It is so ordered.

ADKINS, OVERTON, EHRLICH and BARKETT, JJ., concur.

BOYD, C.J., dissents with an opinion, in which SHAW, J., concurs.

BOYD, Chief Justice, dissenting.

Because I find that Florida's corporate income tax law directly conflicts with federal law specifically prohibiting the application of state taxes to the outer Continental Shelf, I must respectfully dissent from the majority

opinion. I conclude that Congress intended to limit state taxation power over revenues generated from drilling on the outer Continental Shelf regardless of where the sale of the oil takes place and that this limitation, by virtue of the Supremacy Clause, article VI, clause 2, of the United States Constitution, takes precedence over the State of Florida's interest in taxing the income derived from such revenues.

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

This provision standing alone has been interpreted as a limitation on the power of the states to tax the United States

Government. However, it also recognizes that Congress can expand the immunity from state taxation beyond this constitutional limitation. See United States v. New Mexico, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982); see also, Arizona Public Service Commission v. Snead, 441 U.S. 141, 94 S.Ct. 1629, 60 L.Ed.2d 106 (1979). Whether a federal law preempts a state law depends on whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Maryland v. Louisiana, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981), quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). Preemption analysis should not be controlled by mechanical or absolute conceptions, but rather should require a particularized examination of the rele-

vant state and federal interests. See Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982).

Hence an analysis of this case must begin with the purposes and objectives of the Outer Continental Shelf Lands Act, ch. 345, § 2, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331 et. seq. (1982)), which extended the Constitution and laws of the United States to the Outer Continental Shelf; i.e., that property located beyond the three mile limit of state jurisdiction established by the Submerged Lands Act, ch. 65, Title I, § 2, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301 et seq. (1982)). Congress originally declared that the policy of the United States was that:

> (a) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, con-

trol, and power of disposition as provided in this subchapter;

(b) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected.

43 U.S.C. § 1332. Later Congress amended this section to renumber subsections (a) and (b) to (1) and (2) and to add the following subsections (3) thru (6):

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments -

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or

> other occurrences which may cause damage to the environment or to property, or endanger life or health.

Act of Sept. 18, 1978, Pub.L. 95-372, Title II, § 202, 92 Stat 634 (1978).

Section 1333(a)(1) of the Outer Continental Shelf Lands Act extends federal jurisdiction to all artificial islands and fixed structures erected on the Outer Continental Shelf "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." Furthermore Congress also provided:

> (2) ... State taxation laws shall not apply to the outer Continental Shelf.
>
> (3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

43 U.S.C. § 1333.

Section 1334 sets forth the procedures for administering the leasing of the outer Continental Shelf. Under this section the Secretary of Interior is responsible for promulgating rules and regulations determined to be "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein." This section was amended in 1978 to also provide that the lessee "shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan." 43 U.S.C. § 1334(g)(1)

Section 1337 sets forth the procedures for the bidding of leases on the outer Continental Shelf. Subsection (a)(3) presently authorizes the Secretary of Interior to "promote increased production on the lease area, through

direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area." Section 1344 requires the Secretary of Interior to

> prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval.

As can be seen from the above quoted provisions, the major purpose of the outer Continental Shelf Lands Act was to give the federal government exclusive control over the development and production of the mineral resources lying outside the three mile limit. As the United States Supreme Court noted:

> The legislative history confirms that the purpose of OCSLA was "to assert the exclusive jurisdiction and control of the Federal Government of the United States over the

seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources." S.Rep. No. 411, 83d Cong., 1st Sess., 2 (1953) (hereinafter 1953 S.Rep.). Congress enacted OCSLA in the wake of decisions by this Court that the Federal Government enjoyed sovereignty and ownership of the seabed and subsoil of the Outer Continental Shelf to the exclusion of adjacent States. See United States v. Texas, 339 U.S. 707 [70 S.Ct. 918, 94 L.Ed. 1221] (1950); United States v. Louisiana, 339 U.S. 699 [70 S.Ct. 914, 94 L.Ed. 1226] (1950). See also United States v. California, 332 U.S. 19 [67 S.Ct. 1658, 91 L.Ed. 1889] (1947). See generally, Maryland v. Louisiana, 451 U.S. 725, 730 [101 S.Ct. 2114, 2120, 68 L.Ed.2d 576] (1981). Congress chose to retain exclusive federal control of the administration of the Shelf because it underlay the high seas and the assertion of sovereignty there implicated the foreign policies of the Nation. See 1953 S.Rep., at 6. Much of OCSLA provides a federal framework for the granting of leases for exploration and extraction of minerals from the submerged lands of the Shelf. See 43 U.S.C. §§ 1334-1343.

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 480 n. 7, 101 S.Ct. 2870, 2876 n.7, 69 L.Ed.2d 784 (1981).

It is a matter of settled law that no state has jurisdiction to tax in an area of exclusive federal jurisdiction located within a state. Ramah Navajo School Board v. Bureau of Revenue of New Mexico, supra; James v. Dravo, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937). Since Congress extended federal jurisdiction to the outer Continental Shelf "to the same extent" as if it were an area of exclusive federal jurisdiction within a state, this body of settled law applies with equal force to the outer Continental Shelf and effectively prohibits the imposition of any state tax on revenues derived therefrom.

The lack of jurisdiction in a state to tax in areas of exclusive federal jurisdiction applies not only to direct taxes but to indirect taxes as well. In Ramah, the Supreme Court held that

federal law preempts a state Tax imposed on the gross receipts a non-Indian construction company received for the construction of a school on a reservation. The Court concluded that the federal objectives of educating Indian children outweighed the state's objective of raising revenue. In James v. Dravo, the United States Supreme Court was faced with the question of whether "annual privilege taxes" measured by profits from "business and other activities" could be imposed by West Virginia on a contractor working on government-owned land. The Supreme Court stated that this depended upon "whether the United States has acquired exclusive jurisdiction over the respective sites. Wherever the United States has such jurisdiction the state would have no authority to lay the tax." Id. at 140, 58 S.Ct. at 212.

With respect to the outer Continental Shelf, the United States Supreme Court has expressly stated that a state "has no valid interest in imposing a severance tax on federal OCS land." Maryland v. Louisiana, 451 U.S. at 752 n. 26, 101 S.Ct. at 2132 n. 26. In that case several States filed an original action with the Supreme Court challenging the constitutionality of Louisiana's First-Use Tax. They claimed, among other things, that the tax was in direct conflict with the Outer Continental Shelf Lands Act. Louisiana attempted to "justify the tax as a means of alleviating the alleged discrimination against Louisiana gas caused by the fact that Louisiana gas must pay the state severance tax while OCS gas does not." Id. In response to this argument the Supreme Court noted that

> if correcting the claimed imbalance were the sole justification asserted for the First-Use tax, there would be grave doubt about the validity of the Tax. The proper fee or charge for drilling for gas on the OCS is a determination which is solely within the province of the Federal Government. Even if the United States were to decide to open up development to all comers at no charge in order to spur development of natural gas, Louisiana would have no interest in overriding that decision by imposing a tax to equalize the cost of local production with that on the federal OCS area. Permitting the States to exercise such power would adversely affect the price which the Government could command from private developers in their bid price. As clearly required by the OCS Act, Louisiana's sovereign interest in the development of offshore mineral interests stops at its 3-mile border.

Id.

The reason why the Supreme Court did not specifically decide to hold that Louisiana's First-Use tax was in direct conflict with the Outer Continental Shelf Lands Act was because Louisiana also argued that certain environmental interests were being served by the tax. If true, then the tax would not be

in direct conflict with the OCSLA because Congress adopted specific provisions allowing the states to retain control over the environmental impact offshore drilling may have in their jurisdictions. Since the First-Use tax applied to oil obtained from sources other than the outer Continental Shelf, resolution of this issue would not have been dispositive of the case and was therefore unnecessary to decide. Thus judicial conservatism, not judicial imprimatur as the majority opinion suggests, was the reason why the Supreme Court did not test the validity of this tax by examining its effect on the OCSLA. From this discussion, it is clear that the Supreme Court intends that the appropriate process for analyzing the preemption question is to examine the relative interests of the state and federal government, and not to

decide the matter by using a mechanical or absolute concept as was done in the majority opinion.

The next step in this analysis is to determine whether Florida's Corporate Income Tax Code, chapter 220, Florida Statutes (1985), conflicts with federal governments regulating the production of oil on the outer Continental Shelf. Florida's corporate income tax is a tax on income "at such time as such income is realized for federal income tax purposes." § 220.02(4)(a), Fla.Stat. (1985). The amount of income attributed to being earned in Florida is calculated by the apportionment formula found in chapter 214, Part IV, Florida Statutes (1985). Simply stated, this formula is the sum of three fractions. The numerators of these fractions are the corporation's real and tangible personal property, payroll, and sales within

Florida and the respective denominators are the total amounts of the corporation's real and tangible personal property, payroll, and sales in the United States, its territories, and any foreign country.

It is clear that this tax can have a great impact upon the production of oil on the outer Continental Shelf. The higher the tax, the less incentive for companies to explore and produce oil. This could be in direct contravention to the desires of the federal government and could interfere with its sole responsibility to oversee the production and preservation of natural resources contained in the outer Continental Shelf. The impact of this tax does not depend on where the sale of the oil takes place.

It is also clear that the tax is not imposed to further any conservation

or environmental goals. For that reason it does not fall within the range of authority Congress specifically delegated to the States under the OCSLA.

Since this tax directly conflicts with the OCSLA, the amount of income generated by the production of oil and gas on the outer Continental Shelf should be excluded from the net income subject to Florida's corporate income tax pursuant to section 220.02(5), Florida Statutes (1985). The proper amount to be excluded is the fair market value of the oil and gas at the well head. This is a well established and commonly accepted practice in the industry for determining the value of oil and gas, and is in fact, the method used by the United States government itself in determining the price it pays for oil and gas produced on the outer Continental Shelf. See 43 U.S.C. § 1353(2).

In every other respect I agree with the majority opinion. But because of the reasons discussed above, I feel compelled to dissent. I would therefore reverse the decision of the district court of appeal and remand this case to the trial court for further proceedings consistent with this dissent.

SHAW, J., concurs.

Appendix 2

SHELL OIL CO.

v.

DEPT OF REVENUE

Cite as 461 So.2d 959

(Fla.App. 1 Dist. 1984)

SHELL OIL COMPANY,

Appellant,

v.

DEPARTMENT OF REVENUE,

Appellee.

No. AS-159.

DISTRICT COURT OF APPEAL OF FLORIDA,

First District.

April 3, 1984.

Rehearing Denied Nov. 6, 1984.

The Circuit Court, Leon County, Ben C. Willis, J., entered a summary judgment subjecting income derived from the sale of oil to the corporate income tax,

and the oil company appealed and the Department of Revenue cross-appealed. The District Court of Appeal, Smith J., held that: (1) income which oil company derived from sale in the United States of oil from wells located on the outer continental shelf during the years in question was subject to corporate income tax, but question was of great public importance and would be certified, and (2) oil company was entitled to include drilling and development costs in the property factor in the apportionment formula in determining the amount of corporate income tax.

Affirmed.

Wentworth, J., concurred and dissented with opinion on rehearing.

1. Taxation 1002

Income which oil company derived from sale in the United States of oil from wells located on the outer continental shelf during the years in question was subject to corporate income tax. Outer Continental Shelf Lands Act, § 4(a)(2)(A), as amended, 43 U.S.C.A. § 1333(a)(2)(A); West's F.S.A. § 214.71.

2. Taxation 1002

Assessing corporate income taxes on income derived from the sale in the United States of oil extracted from the outer continental shelf was not violative of the Outer Continental Shelf Lands Act. Outer Continental Shelf Lands Act, § 4(a)(2)(A), as amended, 43 U.S.C.A. § 1333(a)(2)(A); West's F.S.A. § 214.71.

3. Taxation 1005

Outer continental shelf property and payroll did not come within the parameters of "everywhere" in the statute governing the corporate income tax and thus could not be included in the denominators of the property and payroll factors even though the sales in the United States of oil derived from the outer continental shelf occurred in the various states of the United States defined as "everywhere" in the tax statute. Outer Continental Shelf Lands Act, § 3(a), as amended, 43 U.S.C.A. § 1332(a); West's F.S.A. §§ 220.15(3), 214.71(1).

4. Taxation 1005

A direct correlation was not required between the income from the sales of oil subject to the corporate income tax and the property, payroll,

and sales included in the apportionment formula. Outer Continental Shelf Lands Act, § 3(a), as amended, 43 U.S.C.A. § 1332(a); West's F.S.A. §§ 220.15(3), 214.71(1).

5. Taxation 1005

Oil company was entitled to include drilling and development costs in the property factor in the apportionment formula in determining the amount of corporate income tax it owed on the sales in the United States of oil derived from the outer continental shelf. Outer Continental Shelf Lands Act, § 3(a), as amended, 43 U.S.C.A. § 1332(a); West's F.S.A. §§ 220.15(3), 214.71(1).

On Rehearing

6. Taxation 1078, 1087

Statute requiring a taxpayers' method of accounting to be the same as

its method of accounting for federal income tax purposes may have precluded oil company from classifying intangible drilling and development costs as expenses in its federal income tax returns, thus effecting a reduction in tax income for the year in which the expenditures were made, but since the statute was not cited in the taxpayer's brief or its oral argument, issue could not be raised for the first time on appeal. West's F.S.A. §§ 120.54(7), 220.42.(1).

Robert B. Glenn, Jr., of Glenn, Rasmussen, Fogarty & Merryday, Tampa, Elizabeth C. Burton, Houston, Tex., for appellant.

Jim Smith, Atty. Gen., Thomas L. Barnhart, Asst. Atty. Gen., Tallahassee, for appellee.

SMITH, Judge.

Shell appeals from the trial court's final summary judgment holding, among other things, that the Department's treatment of Shell's income derived from the sale in the United States of oil from wells located in the outer continental shelf during the years from 1972 to 1975 does not violate the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(a)(2)A. The Department cross-appeals the trial court's finding that Shell may include all of the original costs" of its oil and gas wells, in particular its intangible drilling and development costs, in the property factor of the apportionment formula for determining its Florida corporate taxes, Section 214.71, Florida Statutes (1972). We affirm the final summary judgment in its entirety.

[1,2] Shell's primary issue is apparently one of first impression in this state and elsewhere, namely, whether 43 U.S.C. § 1333(a)(2)A,[1] infra, prohibits Florida from taxing its income

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1. § 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

* * * * * *

(2)(a) To the extent that they are applicable and not inconsistent with this subchapter or with Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the

continued next page

from the sale in the United States of oil extracted from its outer continental shelf wells. We reject Shell's position that it does, for all of the oil from these wells was brought into the United States, refined in the United States, and then sold in the United States. Florida is thus assessing corporate income taxes on income derived from sales occurring in the United States, so the significant event for purposes of that tax is the sale of the oil, not the removal of the oil from the outer continental shelf. Taking Shell's

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1. continued

> Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf. (emphasis supplied)

argument to its logical conclusion, a state could not impose any tax, such as a sales tax, for any product it derives from its outer continental shelf wells. We cannot agree that an interpretation having such sweeping consequences was ever intended by the Congress, and we therefore reject it.

As a corollary argument Shell contends that Section 220.02(5), Florida Statutes,[2] requires the complete exclusion of income derived from the outer continental shelf oil because

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2. 220.02 Legislative intent. -
* * * * * *
(5) It is the intent of the legislature that if there is included in any taxpayer's net income subject to tax under this code any item or items of income which are determined to be improperly so included because of a conflict with any federal statute, the Constitution of the United States, or the state

continued next page

including that income would cause a conflict with a federal statute, in this case the OCSLA. We view this contention as nothing more than a restatement of Shell's first issue discussed above and therefore reject it.

Shell also argues that there should be a direct correlation between the income subject to the Florida corporate tax and the property, payroll and sales included in the apportionment formula, citing Heftler Construction v. Department of Revenue, 334 So.2d 129 (Fla. 3rd DCA 1976). Before analyzing this issue,

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2. continued

constitution, all such items of income shall be excluded from the net incomes of all taxpayers subject to the tax under this code, but all other provisions of this chapter, and their application, shall not be invalidated or in any way impaired by such required exclusion of an item or items of income.

however, a brief description of Florida's method of apportioning corporate taxes may be useful.

The income of a business, such as Shell, operating both within and without Florida, is apportioned to Florida in accordance with a three-factor formula. While the normal three-factor formula is the arithmetic average of three factors, a corporation's property, payroll, and sales, Florida's formula is double-weighted in favor of the sales factor. Each apportionment factor is therefore the ratio of Florida business activity (property, payroll, and sales) to "everywhere" business activity (property, payroll, and sales). Sections 214.71, and 220.15, Florida Statutes. "Everywhere" means "in all states of the United States, the District of Columbia, or any political subdivision of the

foregoing." Section 220.15(3), Florida Statutes.

Shell excluded its outer continental shelf income from income apportionable to Florida by subtracting from its adjusted federal taxable income the wellhead fair market value of the oil recovered at its outer continental shelf drilling installations, less related expenses. It also excluded outer continental shelf real and tangible personal property from the denominator of the property factor, outer continental shelf payroll from the denominator of the payroll factor, and outer continental shelf sales from the denominator of the sales factor of the apportionment formula. It now urges, as it did before the trial court, that this process is justified by the Heftler decision. Shell further argues that the

Department's inclusion of sales of oil derived from the outer continental shelf wells in the denominator of sales factor is inconsistent with its exclusion of outer continental shelf property and payroll from the denominators of the property and payroll factors.

[3] Addressing the latter contention first, we find that the Department properly computed Shell's sales, property, and payroll "everywhere" in the denominators of the sales, property, and payroll factors. "Everywhere" is defined by Section 220.15(3) to include "all states of the United States, the District of Columbia, or political subdivision of the foregoing." The outer continental shelf, however, is not a state of the United States, the District of Columbia, or political division thereof. Rather, it is a part of the

United States, 43 U.S.C. § 1332(a), Internal Revenue Code, § 638, so while the sales in the United States of oil derived from the outer continental shelf wells occurred in the various states of the United States defined as "everywhere," outer continental shelf property and payroll do not come within the parameters of "everywhere," Section 220.15(3), and thus cannot be included in the denominators of the property and payroll factors.

[4] We likewise reject Shell's contention that Heftler mandates a direct correlation between the income subject to tax in Florida and the property, payroll, and sales included in the apportionment formula. Simply stated, the profits and losses involved in Heftler were earned in Puerto Rico and were therefore considered foreign,

while the income in Shell's case was realized totally from sales of oil in the various states of the United States.

[5] We also must reject the Department's argument on cross-appeal to the effect that Shell should not be allowed to include drilling and development costs in the property factor in the apportionment formula. Property, both real and tangible, is to be valued at original cost, Section 214.71(1), and the Department has defined "original cost" as follows:

> As a general rule "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange or abandonment, etc.

Florida Administrative Code Rule 12C-1.15(4)(b)5. Relying on this rule, the

Department urges that Shell's intangible drilling and development expenditures have no recognizable cost or other basis sufficient to permit the inclusion of those costs in the property factor because they have been deducted by Shell for federal income tax purposes in accordance with Section 263(c) of the Internal Revenue Code. We note that when Shell did so, according to the federal rule, it also forfeited any right to include these costs in the federal tax basis of the property. However, while the Internal Revenue Code may so treat these costs, there is nothing in Rule 12C-1.15(4)(b)5 that mandates how these capital additions for improvements are to be treated, for Florida tax purposes, because of a taxpayer's election, as permitted under Section 263(c) of the Internal Revenue Code, to either deduct these intangible

drilling costs from his gross income or to capitalize those costs in following years. Since Shell's capitalization of these costs is permissible "for federal income tax purposes," Shell's procedure conforms to the Department's rule.

AFFIRMED.

WENTWORTH and JOANOS, JJ., concur.

ON MOTION FOR REHEARING

Shell petitions this court for rehearing; the Department on cross-appeal petitions for rehearing and/or clarification. We find that Shell's petition fails to convince us that our original opinion misconstrued or misapplied the law or the facts involved in Shell's points on appeal. Accordingly, Shell's petition for rehearing is denied.

We also deny cross-appellant Department of Revenue's motion for rehearing and clarification. The motion is

directed to that portion of our decision affirming the trial court's final summary judgment prohibiting the department from excluding Shell's intangible drilling and development costs (IDC's) from Shell's property factor in the department's apportionment formula.

[6] The department now urges that this court overlooked Section 220.42(1), Florida Statutes. That section provides, in pertinent part:

> (1) For purposes of this code, a taxpayer's method of accounting shall be the same as such taxpayer's method of accounting for federal income tax purposes . . . . (e.s.)

This provision, the department argues, precludes Shell from classifying IDC's as expenses in its federal income tax returns (thus effecting a reduction in taxable income for the year in which the expenditures are made), while at the same time classifying them as capital

assets (treated as a part of the cost of acquisition of the oil well), for Florida income tax purposes. Shell's unrefuted affidavits established that Shell, for years, has maintained corporate financial records treating these IDC's as capital assets, thus properly treatable, under Shell's view, as a part of the "original cost" as this terminology is used in Rule 12C-1.15(4)(b)5, Florida Administrative Code, both in the numerator and denominator of the apportionment formula.

There is merit in the department's position that the statute (Section 220.42(1)) would indicate that IDC's should be treated the same in the apportionment formula as in Shell's federal income tax returns. We may speculate that had this statute been urged in the court below, in support of the depart-

ment's interpretation of its rule, the trial judge's decision might well have been favorable to the department on this issue. However, so far as we have been able to determine from the record, the statute was never mentioned below. Neither was the statute cited in the department's brief in this court, nor in oral argument. Furthermore, the issue as presented in this court, as framed by the department, was "[W]hether the definition of 'original cost' provided in Rule 12C-1.15(4)(b)5, F.A.C., is a valid exercise of delegated legislative authority." We find that the rule itself contains no reference to Section 220.42(1), although under the rule-making provisions, Section 120.54(7), Florida Statutes, each rule is required to contain a reference to "the section or subsection of the Florida Statutes or Laws of Florida being implemented,

interpreted, or made specific." The basic issue in this case, as indicated in our original opinion, was whether the procedure followed by Shell conformed to the rule, or was prohibited by it. The trial court, after consideration of the pleadings and the evidence produced on Shell's motion for summary judgment, determined this issue in favor of the taxpayer. This court affirmed that ruling, which we find to be consistent with the rule governing construction of taxing enactments in favor of the taxpayer. See, Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184 (Fla. 1st DCA 1975); Harris Corporation v. Department of Revenue, 409 So.2d 91, 93 (Fla. 1st DCA 1982) (Ervin, J. specially concurring).

Our disposition of the department's motion for rehearing is mandated by the

rule that authorities not cited and issues not raised in the brief or on oral argument cannot be raised for the first time on motion for rehearing. Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977); Cartee v. Florida Department of Health and Rehabilitative Services, 354 So.2d 81 (Fla. 1st DCA 1977). The department's motion for rehearing is therefore denied.

One final matter requires our attention. Shell has requested that we certify the question of whether the department is prohibited by 43 U.S.C. § 1333(a)(2)(A) (1981), from levying a corporate income tax on income derived from the outer continental shelf. Since this question is one of first impression, and is vitally important to the state's ability to raise revenue via corporate income taxation, we grant

Shell's request, and certify the following question as being of great public importance, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v):

> WHETHER THE STATE OF FLORIDA IS PROHIBITED BY 43 U.S.C. § 1333(a)(2)(A) FROM IMPOSING A TAX UPON INCOME DERIVED FROM THE SALE IN THE UNITED STATES OF OIL EXTRACTED FROM THE OUTER CONTINENTAL SHELF?

Motion for rehearing DENIED, question certified.

JOANOS, J., concurs.

WENTWORTH, J., concurs and dissents with written opinion.

WENTWORTH, Judge, concurring and dissenting on rehearing.

I agree with denial of appellant's motion for rehearing but would grant cross-appellant's motion and reinstate the Department's determination of Shell's property factor in the appor-

tionment formula. Section 220.42(1), Florida Statutes, requires that for Florida income tax purposes Shell's "method of accounting shall be the same as such taxpayer's method of accounting for federal income tax purposes." I would conclude upon reconsideration that this statutory language dictates a construction of Rule 12C-1.15(4)(b)5, F.A.R., to require that Shell's method of accounting for federal income tax purposes, by which it deducted intangible drilling costs from gross income and precluded capitalization thereafter, determines the method of accounting by which the property factor shall be computed in the apportionment formula under the Florida code. I would reverse on cross appeal because I review the action of the trial court as if it had complied, as we should, with the mandate for judicial notice of pertinent Florida

statutes in resolving this litigation. § 90.201, Florida Statutes; Barnett Bank of Jacksonville v. Jacksonville National Bank, 457 So.2d 535 (Fla. 1st DCA 1984).[1] The context of the present case is peculiarly unsuited to the application of a waiver doctrine against administrators in a way which subverts the terms of a statute merely because a rule, which functionally if not nominally implements all pertinent statutes, may not have been defended with perfection.

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1. Although [the statute] was not called to the trial court's attention, nevertheless it must be followed by this court because the statute controls the matter before us. Bedenbaugh v. Adams, 88 So.2d 765 (Fla. 1956).

Appendix 3

CASE NO. 80-987

IN THE CIRCUIT COURT FOR

LEON COUNTY, FLORIDA

SHELL OIL COMPANY,

Plaintiff.

vs.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA.

Defendant.

RECORDED

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PAUL F. HARTSFIELD

CLERK OF CIRCUIT COURT

/

FINAL JUDGMENT

This case involves Florida corporate income taxes for Shell Oil Company ("Shell") for the years 1972 through 1975. Both Shell and the Department of Revenue of the State of Florida (the "Department") moved for summary judgment, and the court has previously entered two orders, both dated February

3, 1983, ruling on these motions. After deciding the motions for summary judgment, only one issue remained for determination, i.e., whether Shell's income derived from its production business on the Outer Continental Shelf ("OCS") should be apportioned by the apportionment formula contained in Section 214.71, Florida Statutes, as modified by Section 220.15, Florida Statutes (the "Apportionment Formula") or by the Apportionment Formula as further modified by including OCS property, payroll, and sales in the denominators of the Apportionment Formula. Although this issue was originally part of Shell's motion for summary judgment, Shell withdrew this issue prior to the summary judgment hearing. The court has denied the Department's motion for summary judgment on this issue. Shell has now filed a motion to amend to delete its prayer for

relief relating to this withdrawn issue, and upon ruling on the motion to amend, all issues will have been decided on summary judgment. Therefore, it is

ORDERED AND ADJUDGED as follows:

1. Shell's Motion to Amend to delete its prayer for relief relating to the withdrawn issue is hereby granted.

2. The court adopts its orders dated February 3, 1983, on the motions for summary judgment filed by Shell and the Department as follows:

(a) Shell's Motion for Summary Judgment on the first issue raised by Shell, i.e, whether the treatment by the Department of Shell's income derived from its production business on the OCS violated the Outer Continental Lands Act, 43 U.S.C. §1333(a)(2) is denied, and the Department's Motion for Summary Judgment on this issue is granted.

(b) Shell's Motion for Summary Judgment on the issue of whether the Department unlawfully refused to allow Shell to include all of its original costs of its oil and gas wells, particularly its intangible drilling and development costs, in the property factor of the Apportionment Formula is granted, and the Department's Motion for Summary Judgment on this issue is denied.

(c) The Department having admitted the mechanical error in the calculation of the property factor of the Apportionment Formula, causing an overstatement of Shell's tax liability by $5,504, Shell's motion on this issue is granted.

(d) Shell's Motion for Summary Judgment on the issue of whether a portion of the Department's assessment for 1972 is barred by the applicable statute of limitations is denied, and the

Department's Motion for Summary Judgment on this issue is granted.

3. As a result of the foregoing rulings, the Department has overstated Shell's tax liability by $5,504 because of a mathematical error in the calculation of the property factor of the Apportionment Formula contained in §214.71, Florida Statutes. The Department further overstated Shell's income taxes by $24,230.00 because of its failure to allow Shell to include all of its original costs of oil and gas wells, particularly intangible drilling and development costs in the property factor of the Apportionment Formula.

DONE AND ORDERED at Tallahassee, Florida, this 24th day of March, 1983.

Ben C. Willis, Circuit Judge

Copies furnished to:

Robert B. Glenn, Jr.

Thomas L. Barnhart

Appendix 4

IN THE SUPREME COURT OF FLORIDA

MONDAY, NOVEMBER 24, 1986

CASE NO. 66,240

SHELL OIL COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent

CASE NO. 66,254

DEPARTMENT OF REVENUE,

Petitioner

vs.

SHELL OIL COMPANY,

Respondent.

On consideration of the motion for rehearing filed by attorneys for Shell Oil Company, and response thereto, it is ordered that said motion be and the same is hereby denied.

The motion to strike and expunge record is granted and the Motion for Order Compelling Compliance with Court Decision along with the documents attached to said motion are hereby stricken.

The Request for Further Oral Argument filed by attorneys for Shell Oil Company is hereby denied.

The Motion for Court to Take Judicial Notice filed by attorneys for Department of Revenue on August 26, 1986, is hereby denied.

The Motion for Leave to Brief Case Noticed in this Action filed by attorneys for Department of Revenue is hereby denied.

The Motion for Court to Take Judicial Notice filed by attorneys for Department of Revenue on June 25, 1986, is hereby denied.

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Hon. Donald O. Hartwell, Chief Judge

Arthur J. England, Jr., Esquire
William D. Peltz, Esquire
Elizabeth C. Burton, Esquire
Joseph C. Mellichamp, III, Esquire
Sharon A. Zahner, Esquire

SEAL
Clerk of Supreme Court

Appendix 5

IN THE SUPREME COURT OF

THE STATE OF FLORIDA

Case Nos. 66,240 & 66,254

Shell Oil Company,

Appellant,

vs.

Department Of Revenue State Of Florida,

Appellee.

STAMPED "FILED SID J. WHITE JAN 28 1987 CLERK, SUPREME COURT"

BY: (no signature) Deputy Clerk

Notice Of Appeal to the United States Supreme Court

NOTICE IS GIVEN that Shell Oil Company, Appellant, appeals to the United States Supreme Court, pursuant to 28 U.S.C. § 1257(a), the judgment of this Court in Shell Oil Company v. Department of Revenue, 496 So.2d 789, from which rehearing was denied on November 24, 1986.

Respectfully submitted,

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Shell Oil Company
One Shell Plaza
P.O. Box 2463
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(305) 446-2200

CERTIFICATE OF SERVICE

I certify that true and correct copies of this Notice were mailed on January 27, 1987 to Sharon A. Zahner, Esq. and to Joseph C. Mellichamp, III., Esq., Assistant Attorneys General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399-1050.

/s/ Arthur J. England, Jr.

Appendix 6

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix 7

43 U.S.C. § 1331(a) (1972) provides:

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

Appendix 8

43 U.S.C. § 1301 (1972) provides:

(a) The term "lands beneath navigable waters" means --

(1) all lands within the boundaries of each of of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line

three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,[1] and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such

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1. So in original. Probably should be a semicolon.

State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all politi-

cal subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: Provided, however, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil,

gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in the connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) the term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

Appendix 9

43 U.S.C. § 1333(a) (1972) provides:

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; International boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of tran-

sporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries

were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures of setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

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1. So in original. Probably should be "settling".

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.*

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* In 1978, Pub. L. 95-372 redesignated former subsection (a)(2) as subsection (a)(2)(A) but did not revise the language of that section.

Appendix 10

Section 220.02(4)(a), Florida Statutes (Supp. 1972) provides:

(4) It is the intent of the legislature that the tax imposed by this code shall be prospective in effect only. Consistent with this intention and the intent expressed in subsection (3), it is hereby declared to be the intent of the legislature that:

(a) "Income," for purposes of this code, including gains from the sale, exchange, or other disposition of property, shall be deemed to be created for Florida income tax purposes at such time as said income is realized for federal income tax purposes;

Appendix 11

Section 220.02(5), Florida Statutes (Supp. 1972) provides:

(5) It is the intent of the legislature that if there is included in any taxpayer's net income subject to tax under this code any item or items of income which are determined to be improperly so included because of a conflict with any federal statute, the Constitution of the United States, or the state constitution, all such items of income shall be excluded from the net incomes of all taxpayers subject to tax under this code, but all other provisions of this chapter, and their application, shall not be invalidated or in any way impaired by such required exclusion of an item or items of income.

Appendix 12

Section 220.15, Florida Statutes (Supp. 1972) provides:

220.15 Apportionment of adjusted federal income. -- Adjusted federal income as defined in §220.13 shall be apportioned to this state in accordance with part IV of chapter 214, and for the purpose of applying said part to this code:

(1) The term "sales" in paragraph 214.71(3)(a) shall mean all gross receipts of the taxpayer except interest, dividends, rents, royalties, and gross receipts from the sale, exchange, maturity, redemption, or other disposition of securities; except that:

(a) Rental income shall be included in the term "sales" whenever a significant portion of the taxpayer's business consists of leasing or renting tangible personal property;

(b) Royalty income shall be included in the term "sales" whenever a significant portion of the taxpayer's business consists of dealing in or with the production, exploration, or development of minerals; and

(2) The term "financial organization" in paragraph 214.71(3)(b) shall include any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, or investment company; and

*(3) The term "everywhere" in part IV of chapter 214, which is used in the computation of apportionment factor denominators, shall mean "in all states of the United States, the District of Columbia, or any political subdivision of the foregoing"; and

(4) In lieu of the equally weighted three factor apportionment fraction based on property, payroll, and sales which is described in §214.71, there shall be used for purposes of the tax imposed by this code an apportionment fraction composed of a sales factor representing 50 percent of the fraction, a property factor representing 25 percent of this fraction, and a payroll factor representing 25 percent of the fraction. However, upon application in accordance with paragraph (a), any taxpayer shall be entitled to a refund of tax, in an amount determined under paragraph (b), if it can establish that the aggregate amount of its net income subject to tax under this code and in all other states for the taxable year exceeds 100 percent of the taxpayer's taxable income, as determined for federal income tax purposes, for the taxable year.

(a) Any taxpayer eligible for a refund under this subsection shall make application therfor in accordance with procedures set forth in part I of chapter 214. All applications for refund under this subsection shall be accompanied by a copy of the taxpayer's federal income tax return for the taxable year, copies of every return filed by the taxpayer in the states in which it has conducted business for the taxable year, and verification in the form of cancelled checks or other receipts of the taxpayer's payments of the amounts shown to be due on the several returns filed with the refund application.

(b) The refund to which any taxpayer shall be entitled under this subsection shall be equal to 5 percent of the lesser of:

1. The excess of the amount subject to tax for the taxable year under

this code over the amount which would have been subject to tax if the taxpayer had computed net income for purposes of this code on the basis of the apportionment fraction described in §214.71; or

2. The excess of the aggregate amount of net income subject to tax in Florida and in all other states for the taxable year over the amount of federal taxable income for the taxable year.

(c) For purposes of this subsection, the terms "net income subject to tax" and "amount subject to tax" shall mean the amount against which a rate or rates are applied in determining the taxpayer's dollar liability for tax in any jurisdiction.

Appendix 13

Section 214.71, Florida Statutes (1971) provides:

214.71 Apportionment; general method. --- Except as otherwise provided in §§214.72 and 214.73, the base upon which any tax made applicable to this chapter shall be apportioned shall be determined by multiplying same by a fraction the numerator of which is the sum of the property factor, the payroll factor, and the sales factor and the denominator of which is three. In the event any of the factors described in subsections (1), (2), or (3) has a denominator which is zero or is determined by the department to be insignificant, the denominator of the apportionment fraction shall be reduced by the number of such factors.

(1) The property factor is a fraction the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the taxable year or period and the denominator of which is the average value of such property owned or rented and used everywhere.

(a) Real and tangible personal property owned by the taxpayer shall be valued at original cost. Real and tangible personal property rented by the taxpayer shall be valued at eight times the net annual rental rate paid by the taxpayer less any annual rental rate received from subrentals.

(b) The average value of real and tangible personal property shall be determined by averaging the value at the

beginning and the end of the taxable year or period, unless the department determines that an averaging of monthly values during the taxable year or period is reasonably required to reflect properly the average value of the taxpayer's real and tangible personal property.

(2) The payroll factor is a fraction the numerator of which is the total amount paid in this state during the taxable year or period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the taxable year or period.

(a) The term "compensation" shall mean wages, salaries, commissions, and any other form of remuneration paid to employees for personal services.

(b) Compensation is paid in this state if:

1. The employee's service is performed entirely within the state; or

2. The employee's service is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state; or

3. Some of the employee's service is performed in the state and

a. The base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or

b. The base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed and the employee's residence is in this state.

(3) The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer everywhere during the taxable year or period.

(a) Sales of tangible personal property are in this state if:

1. The property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale; or

2. The property is shipped from an office, store, warehouse, factory, or other place of storage in this state, and either the purchaser is the United States government or the taxpayer is not subject to a comparable tax on the sale in the state of the purchaser.

(b) Sales of a financial organization, including, but not limited to,

banking and savings institutions, investment companies, real estate investment trusts, and brokerage companies, shall be in this state if derived from:

1. Fees, commissions, or other compensation for financial services rendered within this state;

2. Gross profits from trading in stocks, bonds, or other securities managed within this state;

3. Interest and dividends received within this state;

4. Interest charged to customers at places of business maintained within this state for carrying debit balances of margin accounts, without deduction of any costs incurred in carrying such accounts; and

5. Any other gross income resulting from the operation as a financial organization with this state.

(c) In computing the amounts referred to in this subsection, any amount received by a member of an affiliated group (determined under §1504(a) of the Internal Revenue Code, but without reference to whether any such corporation is an "includable corporation" under §1504(b) of the Internal Revenue Code) from another member of such group shall be included only to the extent such amount exceeds expenses of the recipient directly related thereto.